FILE COPY

Office Supreme Court, U.S.
FILED
DEC 14 1959
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1959.

No. 585

RALPH RICHARDSON, Petitioner,

versus

C. C. BRUNNER, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

Lower Court failed to pass (or explain why), on constitutional questions raised. pp. 3-4. 15-16. 23-26. 32-33. 40-41.

FRANK E. HADDAD, JR.,
529 Kentucky Home Life Bldg.,
Louisville 2, Kentucky,
Attorney for Petitioner.

HECTOR E. ROSE, and
ROBERT HUBBARD,
Of Counsel.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

INDEX.

PAGE

Citations to Opinions Below 2

Jurisdiction 2

Questions Presented 3–4

Statutes Involved 4–5

Statement 5–15

How Federal Questions Were Raised 15–16

Reasons Relied on for Allowance of Writ 16–33

Conclusion 33

Appendix I—First Opinion of the Court Below 35–39

Appendix II—Second Opinion of the Court Below 40–41

Appendix III—Constitutions — Statutes — Rules of Civil Procedure Involved 42–46

Appendix IV—Respondent's Complaint 47–49

Appendix V—Default Judgment 50–51

Appendix VI(a)—Motion Under CR 60.02(4)—"The Judgment Is Void" 52–54

Appendix VI(b)—Order Overruling Above Motion 55–56

CITATIONS.

Cases.

PAGE

Richardson v. Brunner, 327 S. W. 2d 572 ..... 2, 26, 27, 32

Richardson v. Brunner, 328 S. W. 2d 530 ..... 2, 26

Brunner v. Bell (Ky.), 290 S. W. 2d 461 ..... 3, 12, 18, 19, 23

Brunner v. Morgan (Ky.), 317 S. W. 2d 882 ..... 3, 18, 19, 23

Hartford Accident & Indemnity Co., Petitioner v. Ray C. Lewis, Judge, Respondent (Ky.), 296 S. W. 2d 228, p. 231 13

Wilson v. Cook, 327 U. S. 474, 90 L. Ed. 793, 66 S. Ct. 663 16

Shepherd v. Pepper, 133 U. S. 626, 33 L. Ed. 706, 10 S. Ct. 438 17

Baker v. Weeks, 178 Ky. 515, 199 S. W. 53, L.R.A. 1918C 152 17

Vallely v. Northern F & M Insurance Company, 254 U. S. 348, 65 L. Ed. 297, 41 S. Ct. 116 17

Anderson v. Anderson, 161 Ky. 18, 170 S. W. 213, L.R.A. 1915C 581 17

Brewer v. Burch, 306 Ky. 339, 207 S. W. 2d 562, 564 17

Woods Bros. Const. Co. v. Yankton Cty., S. D., 54 F. 2d 304, 309 ..... 17, 23

Wolfe v. Combs, Admr. (Ky.), 273 S. W. 2d 33 18

Miller, et al. v. Powers, et al., 184 Ky. 417, 212 S. W. 453 ..... 18, 19, 23

Thatcher, et al. v. Powell, et al., 6 Wheat. 119, 5 L. Ed. 221 19

Williams v. Peyton, 4 Wheat. 77, 4 L. Ed. 518 19

Washington v. Pratt, 8 Wheat. 681, 5 L. Ed. 714 19

Gage v. Bani, 141 U. S. 344, 12 S. Ct. 22, 35 L. Ed. 776 ..... 19, 20

Marx v. Hanthorn, 148 U. S. 172, 13 S. Ct. 508, 37 L. Ed. 410 19

Gage v. Pumpully, et al., 115 U. S. 454, 29 L. Ed. 449, 6 S. Ct. 136 20

PAGE

Carpenter v. Moorelock, etc., 151 Ky. 506, 510, 152 S. W. 575 21

Wagner, et al. v. Peoples Bldg. & Loan Assn., 292 Ky. 691, 167 S. W. 2d 825 ..... 21, 23

Johnson v. Coleman, et al. (Ky.), 288 S. W. 2d 348 21

Hodges v. Hodges (Ky.), 314 S. W. 2d 208 21

Haws v. Short (Ky.), 304 S. W. 2d 924 22

Lorton, et al. v. Ashbrook, et al., 220 Ky. 830, 295 S. W. 1027 23

Lowther v. Moss, 239 Ky. 290, 39 S. W. 2d 501 23

Soper, et al. v. Foster, et al., 244 Ky. 658, 51 S. W. 2d 927 23

Williams v. Wedding, Judge, 165 Ky. 361, 376-379, 176 S. W. 1176 24

City of Corbin, et al. v. Hays, et al., 244 Ky. 33, 50 S. W. 2d 31, 33 24

Turner v. Peters, Police Judge of the City of Hazard (Ky.), 327 S. W. 2d 958, 959 25

Slaughter v. Post, 214 Ky. 175, 282 S. W. 1091 25

City of Jackson v. Murray-Reed-Slone and Company, 297 Ky. 1, 178 S. W. 2d 847 25

Colyer v. City of Somerset, 306 Ky. 797, 208 S. W. 2d 976 25

McCullough v. Maryland, 17 U. S. 316, 4 Wheat. 316, 4 L. Ed. 579, 607 26

Dant v. Progress Paint Co. (Ky.), 309 S. W. 2d 187 ... 27

Fortney v. Mahan (Ky.), 302 S. W. 2d 842 ..... 27, 29, 31

Johnson v. Gernert Bros. Lumber Co., 255 Ky. 734, 75 S. W. 2d 357 31

Strother v. Day (Ky.), 248 S. W. 2d 347 31

Bargo v. Lewis, Judge (Ky.), 305 S. W. 2d 757 29

Bishop v. Bishop, 213 Ky. 703, 281 S. W. 824 30

Carr Creek Community Center, Inc. v. Home Laundry Co., et al., 276 Ky. 840, 125 S. W. 2d 777 30

Carr, et al. v. Brownfield, 255 S. W. 2d 623 30

Richardson v. McCoy, 178 Ky. 677, 190 S. W. 787 30

Richardson v. Brunner, 327 S. W. 2d 572 32

Constitutions—Statutes—Rules of Civil Procedure, Etc.

PAGE

Sec. 1, 14th Amendment of U. S. Constitution.....2, 4, 16, 23, 24

Secs. 2, 109 of Kentucky Constitution.....2, 4, 23, 24

28 U. S. C., Sec. 1257C.....2, 4

Federal Rules of Civil Procedure, 28 U. S. C. (1) (6) of (b) of Rule 12.....2, 4

Federal Rules of Civil Procedure, 28 U. S. C. (h) (1) of Rule 12.....2, 4

Kentucky Revised Statutes, Sec. 91.470.....3, 4, 10, 12 15, 20, 22, 24

Kentucky Revised Statutes, Sec. 91.480.....3, 4, 7, 12 15, 20, 22, 24

Kentucky Revised Statutes, Sec. 91.540.....4, 15, 16, 20, 22, 24, 25, 26, 33

Kentucky Revised Statutes, Sec. 411.120.....4, 20, 22

55 (2) (c) of 28 U. S. C.....4

1, 3, 4 (1) (3) (4) (6) of B of Rule 60 of Federal Rules of Civil Procedure, 28 U. S. C.....4

Kentucky Rules of Civil Procedure 1, 12.02 (1) (6), 55.02 and 60.02 (1), (3), (4), (6).....4, 5, 11, 26-32

Kentucky Rules of Civil Procedure, CR 60.02(6)..13, 14, 30

Kentucky Rules of Civil Procedure 60.02(4).....14, 15, 16, 18, 32

Kentucky Rules of Civil Procedure 60.02(1)(6).....29, 32

5th Amendment U. S. Constitution.....15

Kentucky Rules Civil Procedure 1.....21

Kentucky Rules Civil Procedure 8.01.....21

For verbatim quotations of pertinent parts of the above See pages 42-46, Appendix III.

Miscellaneous.

Sec. 45, pp. 107-108, 30A Am. Jur.....17

IN THE

Supreme Court of the United States

_____ Term.

No. _____

RALPH RICHARDSON, - - - - - - *Petitioner,*

v.

C. C. BRUNNER, - - - - - - *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

May it please the Court:

Petitioner prays that a Writ of Certiorari issue to review the validity of a default judgment involving the validity of a city tax deed conveying his property to the respondent, and to review four (4) final orders overruling motions to set aside said default judgment, and two (2) opinions and/or decisions of the Court of Appeals of Kentucky—the highest court in the state—which affirmed the lower court. Kentucky Rules of Civil Procedure will be referred to herein as CR No. —, p. —. Reference to record will be R., p. —.

CITATIONS TO OPINIONS BELOW.

The Jefferson Circuit Court did not render any opinions. Opinions of the Court of Appeals of Kentucky affirming the Circuit Court are styled "Richardson vs. Brunner", 327 S. W. 2d 572, and Richardson vs. Brunner, 328 S. W. 2d 530. See Appendix I and II hereto, *infra,* pp. 35-41.

JURISDICTION.

Jurisdiction of this court is invoked on the ground that your petitioner has been deprived of his property without due process of law contrary to Sections 2 and 109 of the Constitution of Kentucky and Section one (1) of the 14th Amendment to the Constitution of the United States. The default judgment sought to be reviewed was rendered October 22, 1956, and affirmed March 6, 1959, rehearing denied October 16, 1959 and also on October 23, 1959. Petitioner believes that 28 U. S. C., Sec. 1257(c) confers jurisdiction on this court to grant him a Writ of Certiorari and he also believes that sub-paragraphs (1) and (6) of (b) of Rule 12, and (h) (1) of Rule 12 of the Federal Rules of Civil Procedure, 28 U. S. C. also confer jurisdiction upon this court to grant him a Writ of Cerfiorari.

QUESTIONS PRESENTED.

1. In the sale of petitioner's property for city taxes to the respondent, the mandatory statutory provisions—the uncontradicted facts so show—were not complied with by the city tax receiver. Hence, the city tax receiver's deeds to the respondent were void *ab initio* and conferred no title whatsoever in respondent. Brunner v. Bell (Ky.), 290 S. W. 2d 461, Brunner v. Morgan (Ky.), 317 S. W. 2d 882. Query, can a court render that valid by default or any judgment which is invalid in its inception? If the court cannot render by judgment that valid which is invalid, is not its judgment attempting to do so void?

2. Respondent's claim, cause of action, if any he has or had, is based and founded upon statutory provisions, that is, whether or not, in the sale of petitioner's property to him, the city tax receiver complied in the sale thereof with the mandatory provisions of KRS 91.470 and 91.480. Since his action or claim is based upon statutory provisions, in order to give the court jurisdiction over the subject matter so as to enable said court to render a valid judgment, it was absolutely necessary for respondent, by pleading, motion, complaint, or petition, not only to set up in his pleading the statutory requirements, but to allege that the tax receiver had complied with them in the sale of the property. Since respondent's complaint was and is fatal, for lack of these material and essential allegations, is not the judgment rendered thereon void?

3. Is not the taking of petitioner's property by and under a void judgment without due process of law contrary to Section 1 of the 14th Amendment to the Constitution of the United States?

4. Is not KRS 91.540 invalid, unconstitutional, in that it authorizes a city tax receiver, a ministerial officer to exercise both judicial and executive functions? It empowers a ministerial officer with authority to convey a fee simple title, without giving the property owner an opportunity to have a judicial, or any, determination of the validity of the tax sale. It makes the tax receiver the sole judge of whether or not he has complied with the mandatory statutory provisions in the sale. It opens the door wide to much mischief. Hence, this is taking petitioner's property without due process of law contrary to the 14th Amendment.

U. S. AND KY. CONSTITUTIONS; KENTUCKY STATUTES; FEDERAL AND KENTUCKY RULES OF CIVIL PROCEDURE AND FEDERAL JUDICIARY AND JUDICIAL PROCEDURE ARE INVOLVED.

Section one (1), 14th Amendment, Constitution of the United States; Sections 2 and 109 of the Constitution of Kentucky; Kentucky Revised Statutes, Sections 411.120, 91.470, 91.480, and 91.540; (1) and (6) of paragraph (b) of Rule 12; paragraph (h)(1) of Rule 12; Rule 55(2)(c); (1), (3) (4) and (6) of paragraph (b) of Rule 60 of the Federal Rules of Civil Procedure, 28 U. S. C.; paragraph (c) of Section 1257 of 28 U. S. C. Judiciary and Judicial Procedure; Kentucky

Rules of Civil Procedure, Rules 1; 12.02(1), (6); 55.02; and 60.02(1), (3), (4), and (6). The pertinent parts of the Constitution, statutes, and the Federal and Kentucky Rules of Civil Procedure above-mentioned, citing the volume and page where they may be found in the official edition, are set out verbatim in Appendix III, *infra*, pp. 42-46.

STATEMENT OF MATERIAL FACTS.

The Facts Material to the Consideration of the Questions Presented as Shown by the Record Herein Are Not Denied by the Respondent or Contradicted by Him, in Any Affidavits, Motions, Pleadings, or Proofs, Except in One Respect, Whether or Not Your Petitioner Had Counsel.

In his brief before the court below respondent said: "These sales are conducted in a regular, legal manner and the law is followed closely". He may make the same statement before this Honorable Court. But, in the case at bar, the record herein itself unequivocally contradicts and denies the accuracy and truth of said statement.

Your petitioner, "is able to write his name, but he cannot read nor write, * * * he has to rely on others for reading and writing * * * he has had no formal education" (Petitioner's Affidavit, R., p. 17). His health has been poor for years (Paragraph II, Petitioner's Supplemental Affidavit, R., p. 48). Judge Thomas J. Knight, in his affidavit, among other things, said:

> "In affiant's opinion, the defendant, Richardson, is an illiterate, uneducated, * * * Negro, who is not fully cognizant of his rights * * *" (R., p. 25).

He was born in Taylor County, Kentucky in 1902, came to Louisville, Kentucky in 1918, worked and saved his money. By August 12, 1946 he had saved $4,000 and on that date purchased the property involved herein for $17,000 by paying $4,000 cash and executing a vendor's lien note for $13,000, payable $125.00 per month (which payments were regularly and promptly made). He spent approximately $6,500 on improvements. In 1950 and thereafter it was and still is worth from $19,000 to $22,000 and there was only a small balance on the vendor's lien note due. See Petitioner's Supplemental Affidavit, Paragraph III (R., pp. 48-50). Arnold P. Simons, his rental agent (R., top p. 52), shortly after his property (the title to which is involved herein) was sold in 1950 for city taxes, informed your petitioner that he had better arrange to redeem. Thereupon:

> "VI. * * * This affiant approached a representative or attorneys for the Plaintiff on several occasions and was unable to deal with them because they wanted more than the taxes, interest and penalties; and that on one occasion he offered to redeem—within the time allowed for redemption, as he now recalls—his property from tax sale by offering the Plaintiff's representatives $1,000.00 and to pay the difference or the balance in monthly payments, and that this offer was more, far more,

than the amount of taxes, interest and penalties then due; that he was unable to raise the money to meet their demands, and that the amount of their demands increased as time went on, and that finally, sometime—he believes—in 1954 or 1955, he is not sure which, they demanded $7,000.00, far in excess of the amount of interest, penalties and costs, and they demanded it in cash, which was impossible for this defendant and affiant to raise, and that the Plaintiff, his Agents and Attorneys have by their exorbitant demands from 1951 on down to the present made it impossible for this affiant to raise the money to meet their demands. He says that the misconduct of the Plaintiff, his Attorneys and Agents, in demanding an exorbitant sum to redeem his property, has made it impossible for him to get up the money to pay it off" (Petitioner's Supplemental Affidavit, R., p. 52).

The real estate involved herein consists of three (3) separate and distinct tracts, any one of them was worth more than the taxes on all of them. The sale of any one of them was all that was necessary to pay the taxes on all three (3), yet the city tax receiver, contrary to the mandatory provisions of KRS 91.480 sold all three (3) of them. Petitioner's tendered (made a part of the record for the purpose of appeal) Answer and Counterclaim (R., pp. 37-38).

Your petitioner had ample personal property available subject to distraint to satisfy his city tax bills.

"V. Affiant further states that in 1950, and each and every year since 1950, he has owned personal property in the City of Louisville and in the

County of Jefferson and in the State of Kentucky which was subject to distraint, and of a value far in excess of any and all current City Tax Bills on real estate, and that none of it was distrained or sold to pay said City Tax Bills of any year since 1950 by the Tax Receiver of the City of Louisville." Supplemental Affidavit of your Petitioner (R., pp. 51-52). Petitioner's Original Affidavit, paragraph 4 (R., pp. 17-18).

From 1951 on until after 1955, see above quotation from his affidavit, your petitioner tried and made several attempts to settle with the respondent and or his attorneys, said respondent's city tax claims against him, but said respondent's demands were so outrageous and exorbitant that it was impossible for him to meet them (Petitioner's Original Affidavit, paragraphs 7-19, R., pp. 18-20, Supplemental Affidavit, R., p. 52).

Respondent and his counsel, by their unreasonable and exorbitant demands for redemption, put your petitioner in a financial strait jacket and thus prevented him, made it impossible for him, to redeem his property or to settle with said respondent and/*or to employ counsel to represent him.*

On May 1, 1956 respondent (R., pp. 8-10), filed his complaint (Appendix IV hereto, *infra,* pp. 47-49) which, as will be hereinafter shown, did not state a cause of action which clothed the court below with jurisdiction over the subject matter. Your petitioner, up until that time had not been represented by counsel, in fact, he had been put in such a financial strait jacket by the acts and conduct of respondent and his counsel

that he could not and did not obtain counsel until after the default judgment. He had consulted only with the respondent's counsel. In his Supplemental Affidavit (R., p. 53), your petitioner said:

"VIII. Affiant further states that he has no recollection of being served with a Summons in this action, but he does not deny that he may have and was served but did not understand or know what it was at the time, and that when he inquired around and found out what it was about he tried to employ several lawyers to represent him, but that each and every lawyer he requested to represent him requested and demanded a substantial cash retainer fee, which he was unable to raise due to the misconduct of the Plaintiff in depriving him of rents, etc., and he was unable to get one to represent him in this action until after a default judgment had gone and he had no pleading in the case. He states that after the default judgment had gone against him, Mr. Stewart Miller agreed to represent him for a fee of $2,000 if he could win it, and then shortly thereafter Mr. Miller urged him to give a quit-claim deed to an undisclosed buyer for anything that he could get out of it, even as little as $10.00, and that he, Mr. Miller, would take $500.00; and, when this affiant refused to comply with Mr. Miller's wishes, counsel and request, Mr. Miller voluntarily withdrew from the case and returned his file to this affiant.

"Affiant says that he was then very discouraged and despondent that he could not raise any money, and he was finally sent to his present counsel, H. E. Rose and Robert Hubbard, who agreed to take his case on a strictly percentage basis. This affiant

says that he did not neglect this case, but tried diligently to obtain counsel to represent him, but could not do so for reasons herein expressed."

Mr. J. B. Gathright, one of respondent's counsel in the court below (see his Affidavit, R., p. 22), said that your petitioner did have counsel, Carl Helman and Thomas J. Knight, but Mr. Carl Helman says that he did not represent your petitioner (see his Affidavit, R., pp. 25-26). Judge Thomas J. Knight says that he did not represent your petitioner (see his Affidavit, R., pp. 24-25).

Hence, because of respondent's and his counsel's unreasonable and exorbitant demands above-mentioned, your petitioner was unable to obtain cash to employ counsel to present his defenses. Result, default judgment of October 22, 1956 (R., pp. 14-15, Appendix V hereto, *infra*, pp. 50-51). Thereafter, he did employ Mr. Stewart Miller as shown above, who filed, on November 23, 1956 (R., pp. 15-16), a motion to set aside said default judgment. This motion was supported by petitioner's Affidavit (R., pp. 17-21), showing (1) that he had ample available personal property (KRS 91.470) which the city tax receiver could have but did not distrain and sell, and (2) that he talked to counsel for respondent—he had none of his own—in several efforts to settle respondent's tax claim, but that their demands were so exorbitant that he could not meet them. He showed other pertinent defensive facts. The Affidavits of Carl Helman and Judge Thomas J. Knight above-mentioned, were also filed at that time, along with the Affidavit of Mr. Charles J. Strull (R.,

pp. 22-24). On December 3, 1956 this motion was overruled (R., p. 16, bottom of page).

On March 11, 1957 your petitioner, by H. E. Rose and Robert Hubbard, filed another motion, supported by supplemental affidavit of petitioner, under CR 55.02 and 60.02 (1), (3), and (6) (R., pp. 34-35), to set aside the above Order of December 3, 1956 and the default judgment, and further moved the court for leave to file an Answer and Counterclaim (R., pp. 36-47), which was tendered and made a part of the record for the purpose of appeal. In his tendered Answer and Counter-claim (R., pp. 36-47), he alleged not merely a valid, but a complete and perfect defense.

Additional significant, uncontradicted and undisputed facts established by petitioner's affidavits, motions and tendered answer and counter-claim are: (1) That on November 21, 1950, respondent paid City Taxes on the property involved in the sum of Three Hundred Eight ($308.34) and Thirty-Four Cents. See Petitioner's tendered Answer and Counter Claim (R., p. 40); (2) That petitioner tried to redeem his property within the time allowed by law and before his property was conveyed by City Tax Deed. See petitioner's supplemental affidavit (R., p. 53), but respondent's demands were beyond his reach, see same affidavit (R., p. 53); (3) That on December 8, 1952, when respondent obtained a city tax deed, he had paid (three years) only Nine Hundred Forty Six ($946.68) Dollars and Sixty-Eight Cents (see Answer and Counter Claim, R., p. 40) in City Taxes on property worth Twenty Thousand Dollars ($20,000.00) or more.

Petitioner's Supplemental Affidavit (R., pp. 48, 49); (4) That on October 22, 1956 (date of default judgment), respondent had paid in city taxes on the property involved only Two Thousand One Hundred Seven Dollars ($2,107.58) and Fifty-Eight Cents (R., p. 40); (5) That petitioner's property was on that date worth between Nineteen Thousand Dollars and Twenty-Two Thousand Dollars (see Petitioner's Supplemental Affidavit, R., p. 49), or approximately ten times the amount that the respondent had paid in taxes; (6) That respondent's demands, Seven Thousand Dollars ($7,000.00) cash were so unreasonable, exorbitant and unconscionable that; (a) He could not meet them, and (b) Was for that reason unable to employ counsel; (7) that the tax receiver did not comply (Answer and Counter Claim, R., p. 38) with the mandatory statutory provision of KRS 91.470 and 91.480 in the sale of his property to Respondent. Therefore, respondent had only a tax lien and not a fee. Brunner v. Bell, *supra*. Respondent's counsel, Mr. Josiah B. Gathright, in his affidavit (R., p. 22) said:

> "* * * Affiant states that he had two conversations with the Defendant in the above-styled action in the summer of 1955 in regard to the repurchase of the property in this action from the plaintiff, C. C. Brunner. There were no misrepresentations made to the said Ralph Richardson, he was merely told what Mr. Brunner would take to reconvey the said property to Richardson * * *."

Your petitioner's version of these conversations are set out in his affidavit as follows:

"* * * That Mr. Gathright told him that he was washed out, that Mr. Brunner owned the fee simple title and that this affiant did not have any interest in it, and that if he wanted to buy the property back he would have to get Seven Thousand Thirty-Five Dollars ($7,035.00) cash on the line, that it would not be accepted in payments. That he did try to raise some money to meet Mr. Brunner's demand, and went to see a Mr. Strull who would possibly have let him have Four Thousand or Five Thousand Dollars, but no more. Affiant further states that he became very much discouraged; that after that, and before the default judgment, he contacted some attorneys with a view of employing them and that each and all of them wanted a substantial cash retainer fee, and that he could not raise any money with which to employ an attorney, and he became thoroughly discouraged and was mislead by the conduct of Mr. Brunner and his attorney in telling him that he did not own the property any more, and that he was washed out, and many like statements. He further states that he was ignorant of his rights * * *" (R., p. 107).

CR 60.02(6) reads thus, "* * * or any other reason of an extraordinary nature justifying relief from the operation of the judgment."

The Court of Appeals of Kentucky in Hartford Accident and Indemnity Company, Petitioner v. Ray C. Lewis, Judge, Respondent, (Ky.), 296 S. W. 2d 228, p. 231, said: "We hold that ground (6) must be clearly stated in a written motion or petition attempting to invoke it." In view of this statement of the Court of Appeals, petitioner deemed it advisable to amplify his

grounds under CR 60.02(6). He, therefore, on March 22, 1957, renewed his motion to set aside former orders and the default judgment and concluded his motion thus (1) *"That the Quit-claim tax deeds by which the Plaintiff claims title to the property described in his Complaint are void ab initio because of irregularities in the sale, and (2) that for said judgment to remain in force would be unconscionable, would amount to a confiscation of Defendant's property, and would unjustly and inequitably enrich Plaintiff at Defendant's expense"* (R., p. 64).

The Court of Appeals affirmed the lower court on March 6, 1959, and denied a rehearing on October 16, 1959. Richardson v. Brunner, *supra.*

While studying on a petition for a rehearing, your petitioner's counsel became convinced that the default judgment of October 22, 1956, was absolutely void on grounds hereinafter set forth. Thereupon, on March 24, 1959, your petitioner, under CR 60.02(4)—"the judgment is void"—not before invoked herein, again moved the court (R., pp. 103-105) to set aside the default judgment of October 22, 1956. By final order (R., pp. 109-110) April 14, 1959, said motion was overruled by the trial court. (For this motion and order see Appendix VI(a) and VI(b) hereto, *infra,* pp. 52-56). On October 23, 1959, the Court of Appeals of Kentucky affirmed the above order, dated April 14, 1959 of the trial court (Appendix II hereto, *infra,* pp. 40-41).

FEDERAL QUESTIONS SOUGHT TO BE REVIEWED RAISED BY MOTION AND ORDER (R., pp. 103-105, 109-110).

In his motion of March 24, 1959 (R., pp. 103-105; Appendix VI(a) hereto, *infra*, pp. 52-54), your petitioner said:

> "KRS 91.540 is a drastic statute. It is, in reality, in its very essence and nature confiscatory and to avoid the contravention of the fifth and fourteenth amendments of the Constitution of the United States forbidding the taking of one's property without due process of law, both the pleadings and evidence in such a case must clearly and definitely establish that all the mandatory statutory provisions in respect to the tax sale have been complied with. Chaney, *et al.* v. Commonwealth, 314 Ky. 279, 234 S. W. 2d 960. Hence, since all the mandatory provisions of KRS 91.470 and KRS 91.480, hereinabove set forth, were neither pled nor proved, the default judgment herein is void because it takes defendant's property without due process of law."

The order (Appendix VI(b), pp. 55-56) of April 14, 1959 overruling petitioner's motions under CR 60.02(4) "the judgment is void" of the trial court contained your petitioner's objections and concludes in this language:

> "* * * and further objects on the ground that without such allegations in the complaint, it does not give the court jurisdiction of the subject matter to render the default judgment rendered, and that said default judgment is void, and on the

further ground that without said allegations and proof thereof, said default judgment is the taking of defendant's property without due process of law in contravention of the 5th and 14th Amendments of the Constitution of the United States."

Perhaps not as aptly expressed as it could have been, yet, petitioner by this motion definitely raised two Federal questions, (1) that KRS 91.540 permitted the taking of petitioner's property without due process of law contrary to the 14th Amendment, (2) that the complaint did not state a cause of action which clothed the court with jurisdiction over the subject matter, so as to enable the court to render valid judgment. HENCE, PETITIONER RAISED, BY HIS MOTION AND THE ORDER, FEDERAL QUESTIONS, BUT HE COULD NOT COMPEL THE LOWER COURT TO PASS ON THEM. Wilson v. Cook, 327 U. S. 474, 90 L. Ed. 793, 66 S. Ct. 663.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

A. The Issue, the Question Involved Herein, Is of Wide Importance Under the Constitution of the United States. It Involves the Security of a National Right, Namely, That a Person Shall Not Be Deprived of His Property—Real Property Here—Without Due Process of Law, Either by a Legislative Enactment or by a Void Judgment.

Your petitioner respectfully submits that the issue involved herein, namely, can his property be taken without due process of law either by a legislative enactment or by a void judgment, or by both, is of very wide importance. It affects every real property owner

under the Government of the United States. For reasons hereinafter specifically set forth, your petitioner further respectfully submits that the issue involved herein cannot be disposed of on a non-constitutional ground, nor can judgment of the court below be sustained on an independent state ground.

B. Void Judgment Creates No Rights.

> "Sec. 45 Void Judgments. * * * It has no legal or binding force or efficacy for any purpose or at any place. It cannot affect, impair, or create rights. * * * It may be attacked by any person adversely affected by it, in any proceeding, direct or collateral, at any time. All proceedings founded on a void judgment are themselves regarded as invalid. In other words, a void judgment is regarded as a nullity, * * *". 30A Am. Jur., pp. 107-108.

Among opinions cited are: Shepherd v. Pepper, 133 U. S. 626, 33 L. Ed. 706, 10 S. Ct. 438; Baker v. Weeks, 178 Ky. 515, 199 S. W. 53, L.R.A. 1918C 152; and Vallely v. Northern F. & M. Insurance Company, 254 U. S. 348, 65 L. Ed. 297, 41 S. Ct. 116; Anderson v. Anderson, 161 Ky. 18, 170 S. W. 213, L.R.A. 1915C 581 and many others. See also Brewer v. Burch, 306 Ky. 339, 207 S. W. 2d 562; Woods Bros. Const. Co. v. Yankton Cty, S. D., 54 Fed. 2d 304, p. 309.

C. Petitioner Had a Right to Make a Motion, Under CR 60.02(4) "The Judgment Is Void".

Your petitioner had a right while his appeals were pending in the Court below, to make, under CR 60.02(4), a motion to vacate the default judgment.

Wolfe v. Combs Admr. (Ky.), 273 S. W. 2d 33. The Court erroneously held that "the other three motions which sought the same relief on the same grounds were overruled * * *."

D. Unless Statutory Provisions Are Complied With in the Sale of Real Estate for Taxes, a Tax Deed to the Purchaser Is Void and Conveys No Title Whatever to the Grantee.

"(1) A DEED VOID *AB INITIO* CONFERS NO TITLE WHATEVER UPON THE GRANTEE. * * *

"(2) A TAX DEED DOES NOT CONFER TITLE ON THE GRANTEE IF THE PROCEEDINGS * * * WERE IRREGULAR AND ESSENTIAL STEPS WERE OMITTED. SUCH DEED MAY BE ATTACKED AT ANY TIME BECAUSE IT IS VOID."

Miller, *et al.* v. *Powers, et al.*, 184 Ky. 417, 212 S. W. 453.

"WE HAVE HELD CONSISTENTLY THAT PROCEEDINGS TO SELL PROPERTY FOR TAXES MUST CONFORM TO STATUTORY PROVISIONS, AND PROCEEDINGS WHICH FAIL TO DO SO ARE VOID." Brunner v. Bell (Ky.), 290 S. W. 2d 461.

In Brunner v. Morgan (Ky.), 317 S. W. 2d 862, the Court of Appeals said:

"Appellant contends that KRS 91.480 (3) renders directory KRS 91.470 and 91.480 (1) (2), the same contention was unsuccessfully made in

Brunner v. Bell, Ky., 290 S. W. 2d 461. A full discussion of the statutes and principles involved is contained therein. Brunner v. Bell, *supra*, is controlling here."

This court, speaking by Chief Justice Marshall in Thatcher, *et al.* v. Powell, *et al.*, 6 Wheat. 119, 5 L. Ed. 221, said:

> "That no individual or public officer can sell, and convey a good title, to the land of another, unless authorized to do so by express law, is one of those self-evident propositions to which the mind assents, without hesitation; *and that the person invested with such power, must pursue with precision the course prescribed by law, or his act is invalid, is a principle which has been repeatedly recognized in this Court.*"

Compliance with all statutory prerequisites must be shown to sustain a tax deed. Williams v. Peyton, 4 Wheat. 77, 4 L. Ed. 518. A statute providing for the sale of property for taxes must be strictly pursued. Washington v. Pratt, 8 Wheat. 681, 5 L. Ed. 714.

It is settled law in Illinois that a tax title to land is purely technical and depends for its validity upon a strict compliance with the statute. Gage v. Bani, 141 U. S. 344, 12 S. Ct. 22, 35 L. Ed. 776. As above shown in Miller v. Powers, Brunner v. Bell, and Brunner v. Morgan, *supra*, the same is true in Kentucky.

See also Marx v. Hanthorn, 148 U. S. 172, 13 S. Ct. 508, 37 L. Ed. 410. The law in respect to tax deeds,

as established by the opinions of this court above has not been overruled.

This court follows the rules of the State courts in such matters. Gage v. Bani, *supra;* Gage v. Pumpully, *et al.,* 115 U. S. 454, 29 L. Ed. 449, 6 S. Ct. 136.

Hence, when by motions supported by affidavits and tendered Answer and Counter-Claim, your petitioner showed facts—*UNCONTRADICTED FACTS*, namely; that, in the sale of his property to respondent, the statutory requirements of KRS 91.470 and 91.480 were not complied with in the sale thereof, he established, beyond question, that the tax deed to the respondent of his property was and is void— void *ab initio,* void in its inception. Hence, the default judgment was and is void, for a court cannot by decree or judgment, default or otherwise, render that valid which is invalid in its inception. Hence, petitioner's property was and is taken without due process of law under the 14th Amendment.

E. Where Actions Are Based on Statutes, They Must Be Plead or Judgment Is Void, and It Takes Property Without Due Process.

Respondent's action, if any he has, is based on statutory provisions KRS 411.120 to quiet title, or under KRS 91.470, 91.480, and 91.540, or on both. In any event, in order to clothe the court with jurisdiction over the subject matter, he must plead the provisions of the statutes upon which his action is based or any judgment rendered on his motion, complaint, or plead-

ing, is void. In Carpenter v. Moorelock, etc., 151 Ky. 506, 510, 152 S. W. 575, the court said:

> "When the statute provides a method by which the property may be reached it is not only to be strictly followed but it must be followed to the exclusion of any other method not also clearly provided."

In Wagner, *et al.* v. Peoples Bldg. and Loan Assn. 292 Ky. 691, 167 S. W. 2d 825, the court said:

> "THE FINAL CONCLUSION BEING THAT A SUBSTANTIAL COMPLIANCE WITH STATUTORY REQUIREMENTS TO OBTAIN SUCH A DECREE MUST BE FOLLOWED; OTHERWISE THE JUDGMENT WILL BE VOID."

Liberal Rule 8.01 of Kentucky Rules of Civil Procedure, where a cause of action is based on statutes, does not obviate the necessity of setting up the statutory grounds. Rule 1, of said Kentucky Rules, reads, in part:

> "These rules govern the procedure and practice in all Courts of this State * * * with the exception that they do not govern procedure and practice in any special statutory proceeding * * *."

Johnson v. Coleman, *et al.* (Ky.), 288 S. W. 2d 348; Hodges v. Hodges (Ky.), 314 S. W. 2d 208.

F. Respondent's Action, If Any He Has, Is One to Quiet Title.

Respondent's Complaint, although he claims to base it on his alleged right under KRS 91.540, is in reality a suit to quiet title and is governed by KRS 411.120. To state a cause of action under KRS 411.120, which would clothe the court with jurisdiction over the subject-matter, he must allege that he has possession, not that he is entitled to possession, or else his Complaint is fatally defective and any judgment rendered on it is void. Haws v. Short (Ky.), 304 S. W. 2d 924. Hence, the default judgment herein being void, deprives your petitioner of his property without due process of law.

G. Compliance With the Statutory Provisions of KRS 91.470 and 91.480 Must Be Plead in Connection With KRS 91.540; Otherwise, a Cause of Action Is Not Stated Which Clothes the Court With Jurisdiction Over the Subject Matter.

KRS 91.470 and 91.480 set forth the provisions which the City Tax Receiver must comply with in the sale of real estate for city taxes. The validity of respondent's tax deeds are not based simply upon KRS 91.540, but upon whether or not the provisions of KRS 91.470 and 91.480 above have been complied with. Hence, in order to state a cause of action which clothed the court with jurisdiction over the subject matter either by a Complaint or Motion, it was necessary for respondent to specifically plead and prove

that the City Tax Receiver had, in the sale of your petitioner's property to the respondent, complied with the above-mentioned sections of the statutes. Miller v. Powers, *supra;* Wagner, *et al.* v. Peoples Bldg. and Loan Assn., *supra;* Brunner v. Bell, *supra;* Brunner v. Morgan, *supra;* Lorton, *et al.* v. Ashbrook, *et al.,* 220 Ky. 830, 295 S. W. 1027; Lowther *v.* Moss, 239 Ky. 290, 39 S. W. 2d 501; Soper, *et al.* v. Foster, *et al.,* 244 Ky. 658, 51 S. W. 2d 927. In Woods Bros. Constr. Co. v. Yankton County, S. D., *et al., supra,* the U. S. 8th Circuit Court of Appeals said:

> "In United States v. Turner, 47 F. 2d 86, 89, this Court said: 'BUT ALL COURTS RECOGNIZE THAT, WHERE THE COURT HAS NO JURISDICTION OVER THE SUBJECT MATTER, THE JUDGMENT IS NOT MERELY VOIDABLE BUT IS ABSOLUTELY VOID.' See, also 33 Corpus Juris, p. 1075, Sec. 36; 1 Freeman on Judgments, Sec. 117."

H. KRS 91.540 Is Invalid, Unconstitutional, in Contravention of Section 2 and 109 of the Constitution of the State of Kentucky and of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Section 2 of the Constitution of the State of Kentucky, is, in part: "Absolute and arbitrary power over * * * property of Freemen exists nowhere in a Republic, not even in the largest majority." Section 109 of Kentucky's Constitution is, in part: "The judicial power of the Commonwealth both as to matters of law and equity, shall be vested in * * * one

Supreme Court (to be styled The Court of Appeals) and the courts established by the Constitution." Section 1 of the Fourteenth Amendment to the Constitution of the United States is, in part: "* * * nor shall any state deprive any person * * * of property, without due process of law * * *."

KRS 91.540 clothes and empowers a ministerial officer—the City Tax Receiver—with the absolute and arbitrary power and authority to convey the fee simple title of the owner of real estate without giving said owner an opportunity to have a judicial or any determination as to whether or not said tax receiver in the sale of his property has complied with the mandatory statutory provisions of KRS 91.470 and 91.480. Williams v. Wedding, Judge, 165 Ky. 361, 376-379, 176 S. W. 1176. Within the meaning of "due process of law" KRS 91.540 is in contravention of Section 2 of the Kentucky Constitution and Section 1 of the Fourteenth Amendment to the Constitution of the United States. Hence it is invalid and unconstitutional. City of Corbin, *et al.* v. Hays, *et al.*, 244 Ky. 33, 50 S. W. 2d 31, 33. KRS 91.540 is invalid and unconstitutional in that it vests in the City Tax Receiver (both executive and judicial) the absolute and arbitrary power to be the sole judge of his own acts, that is, whether or not he has complied, in the sale of real estate for taxes, with the mandatory provisions of KRS 91.470, 91.480. Such absolute and arbitrary power—both executive and judicial—conferred upon the City Tax Receiver, clothes, authorizes and empowers him to convey the fee simple title to real estate without due process of

law contrary to Section 2 and 109 of Kentucky's Constitution and Section 1 of the Fourteenth Amendment to the Constitution of the United States. Turner v. Peters, Police Judge of the City of Hazard (Ky.), 327 S. W. 2d 958, 959. See also Slaughter v. Post, 214 Ky. 175, 282 S. W. 1091; City of Jackson v. Murray-Reed-Slone and Company, 297 Ky. 1, 178 S. W. 2d 847; Colyer v. City of Somerset, 306 Ky. 797, 208 S. W. 2d 976.

To comply with due process of law, Federal, State, County and Municipal Governments, in the exercise of eminent domain over private property for public purposes, must give the property owner an opportunity for a judicial hearing as to the value thereof. No absolute monarch in all the pages of history ever exercised a more arbitrary and despotic power over the property of his subjects for taxation than KRS 91.540 grants to City Tax Receiver. This section certainly deprives your petitioner of his property without due process of law.

In his briefs in the court below, respondent said that governments, including a municipal government, must be supported by taxation and they must have authority to collect them. Petitioner concedes this. But, when the State undertakes to confer upon a ministerial officer the absolute right (both executive and judicial authority) to convey the fee simple title without giving the property owner a judicial or any opportunity to be heard as to the validity of the tax sale, the property owner is deprived of his property without due process of law. Chief Justice John

Marshall in McCullough v. Maryland, 17 U. S. 316, 4 Wheat. 316, 4 L. Ed. 579, 607, said that "the power to tax involves the power to destroy." History's pages from time immemorial, discloses that the abuse of taxing power is one among the most potent factors in the downfall of governments. Any judgment based on an invalid statute is void.

I. The Court Below Committed Three Errors, Which in Reality by Judicial Fiat or Decree Deprived Your Petitioner of His Property Without Due Process of Law.

In considering the opinions (1) Richardson v. Brunner, 327 S. W. 2d 572, and (2) Richardson v. Brunner, 328 S. W. 2d 530, of the court below, it is respectfully submitted that this Honorable Court should bear in mind that the three appeals in (1) above were from final orders refusing to set aside the default judgment under CR 60.02 (1) * * * "Excusable neglect"; (3) "* * * misconduct of adverse party;" (6) "any other reason of an extraordinary nature justifying relief from the operation of the judgment." The opinion in (1) above was handed down on March 6, 1959. On those appeals—in (1)—no question under CR 60.02 (4) "the judgment is void," had been raised or was before the court by any motion or pleading, or even by implication. Hence, the validity of the judgment was not and could not have been passed on in (1) above for it was not raised until March 24, 1959. The motion of March 24, 1959, was based on the ground not then before the court; namely, that the default judgment was void for two reasons; one that the Com-

plaint did not state a cause of action which clothed the court with jurisdiction over the subject matter which authorized and empowered the court to render a valid judgment; two, and that KRS 91.540 was and is unconstitutional in that it took your petitioner's property without due process of law.

1. The First Error Consists In Basing Its Opinion of March 6, 1959 (Richardson v. Brunner, 327 S. W. 2d 572, 1, *Supra*, Appendix I, *Infra*, p. 35), Upon Two of Its Opinions; Namely, Dant v. Progress Paint Company (Ky.), 309 S. W. 2d 187, and Fortney v. Mahan (Ky.), 302 S. W. 2d 842. The Dant Case Has No Application Whatsoever and Is Clearly Distinguishable. As Applied By the Court Below, the Fortney Case Has No Application Whatsoever and Is Clearly Distinguishable. But, If the Court Below Had Properly Applied the Fortney Case (As Is Hereinafter Clearly Shown On Pages 31-32) to the Facts In the Case At Bar, It Would Have Set Aside and Vacated the Default Judgment.

NEITHER YOUR PETITIONER NOR THE RESPONDENT, IN THEIR BRIEFS BEFORE THE COURT BELOW, MENTIONED EITHER THE DANT OR THE FORTNEY CASE, *SUPRA*.

A. DANT CASE NOT APPLICABLE, CLEARLY DISTINGUISHABLE.

The facts in the Dant case, as stated by the Court of Appeals of Kentucky, are as follows:

> "Appellee filed this action against Paul Dant to recover the unpaid balance of a foreign judgment. Dant, as his sole defense, asserted that the judgment sought to be collected was void for want of personal service. Appellee filed a motion for summary judgment together with supporting affi-

davits, and Dant filed counter affidavits. On February 17, 1955, the Court upon hearing the motion for summary judgment ordered that the supporting affidavits be considered as supplemental pleadings and further ordered that the proof be taken by and submitted on depositions. It was Dant's burden to prove that the foreign judgment was void as charged in his answer * * *.

"Dant's attorney so advised and told him that that he must make arrangements to pay the necessary reporting fees. Dant then dismissed this attorney and employed another. No proof was taken pursuant to the Court's order. Consequently, on or about October 7, 1955, notice was served on Dant's attorney advising that, on October 13, 1955, motion for judgment would be made by plaintiff because of defendant's failure to take proof and meet the burden. Neither Dant nor his attorney was present on October 13, 1955. Judgment, however, was not taken on that day. The hearing was continued until October 21, 1955, and notice to that effect was duly served on Dant's attorney. Neither Dant nor his attorney appeared on October 21, 1955, and judgment was entered for the sum demanded in the Complaint."

From the undisputed facts hereinabove related in the case at bar, it will readily be seen that the Dant case is not analogous or similar and that it is clearly distinguishable and has no application to the instant case. Hence, the lower court erred in basing its opinion on the Dant case.

B. FORTNEY CASE AS APPLIED BY THE COURT BELOW IS NOT APPLICABLE—CLEARLY DISTINGUISHABLE.

The Court of Appeals of Kentucky cited Fortney v. Mahan (Ky.), 302 S. W. 2d 842, to the effect that the trial court did not abuse a sound discretion in overruling petitioner's motions, under CR 60.02, (1), (3), (6), to set aside and vacate the default judgment.

In that case appellant's counsel on the trial of the case in the lower court deliberately withheld from the evidence certain deeds and a probate record. Then being—

> "unsuccessful in proving his claim on the trial, Fortney attempted on appeal to supplement the record by filing six deeds which had not been introduced in evidence during the trial. We held in Fortney v. Elliott's Admr. (Ky.), 273 S. W. 2d 51, that additions could not be made to the record of matters not considered by the trial court, and affirmed that part of the judgment decreeing the sale of the lands and apportioning distribution of the proceeds."

In the Fortney case there was not a default judgment, but a trial on the merits, appellant being represented by counsel. In that case appellant had opportunity to present his "claim" evidence on the trial. From the undisputed facts hereinabove related in the case at bar, it will readily be seen that the Fortney case is not analogous or similar and that it is clearly distinguishable and has no application to the instant case. Hence the lower court erred in basing its opinion on the Fortney case. Bargo v. Lewis, Judge (Ky.), 305 S. W. 2d 757 is applicable.

2. The Second Error of the Court of Appeals of Kentucky Consisted In Its Failure to Apply the Applicable Law, Which It Had Theretofore in a Long Line of Opinions Established as the Law In Kentucky Relating to Setting Aside Default Judgments.

A. DEFAULT JUDGMENTS NOT FAVORED.

In Bargo v. Lewis, Judge, *supra*, and many other opinions, the Court of Appeals has held that default judgments are not favored.

B. IF IT APPEARS FROM TENDERED ANSWER THAT DEFENDANT HAS A MERITORIOUS DEFENSE THE DEFAULT JUDGMENT WILL BE SET ASIDE.

In Bargo v. Lewis, Judge, supra, the Court of Appeals of Kentucky said:

> "Default judgments are not favored, and it appears from the tendered answer that the defendant has meritorious defenses",

and set aside the default judgment. See also Bishop v. Bishop, 213 Ky. 703, 281 S. W. 824; Carr Creek Community Center, Inc. v. Home Laundry Co., *et al.*, 276 Ky. 840, 125 S. W. 2d 777. Carr, *et al.* v. Brownfield, 255 S. W. 2d 623. Petitioner's tendered Answer and Counter-Claim (R., pp. 39-40), presented a complete and perfect defense.

C. EXCUSABLE NEGLECT—ILLITERATE—IGNORANT OF RIGHTS.

The Court of Appeals of Kentucky has many times held that default judgments will be set aside where it appears that there is excusable neglect, etc. See Richardson v. McCoy, 178 Ky. 677, 190 S. W. 787.

D. ACTS OR CONDUCT OF OPPOSING PARTY THAT MISLEADS OR PREVENTS DEFENSE.

In Strother v. Day (Ky.), 248 S. W. 2d 347, the court said:

> "That if before judgment was rendered the prevailing party or his attorney said or did anything that put his adversary off guard, or prevented him from defending the action, and he shows that he had a *prima facie* valid defense, he is entitled to relief from the judgment' ".

It is respectfully submitted that the Court of Appeals of Kentucky erred in failing to apply the sound principles of law, justice and equity and good common sense which they themselves have established in the setting aside of default judgments. Johnson v. Gernert Bros. Lbr. Co., 255 Ky. 734, 75 S. W. 2d 357.

E. RESPONDENT WOULD NOT BE INJURED BY SETTING ASIDE DEFAULT JUDGMENT—NO INNOCENT THIRD PARTIES.

Even under the authority of Fortney v. Mahan, *supra*, cited by the court below to sustain their first opinion, your petitioner should have been granted relief for in that case the court, speaking of setting aside judgments and granting a new trial said:

> "Two of the factors to be considered by the trial Court in exercising its discretion are whether the movant had a fair opportunity to present his claim at the trial on the merits and whether the granting of the relief sought to be inequitable to other parties."

Petitioner made timely motions to set aside the default judgment. He tendered answer and counterclaim containing a valid and perfect defense. He should have been given an opportunity to present his defense on the merits and the granting to him of this relief would not have been inequitable to the respondent for said respondent still had his tax lien and no innocent parties were affected.

3. The Third Error of the Court Below Is In Its Opinion of October 23, 1959—Richardson v. Brunner (2 Above) 328 S. W. 2d 530, Appendix II, *Infra*, pp. 40-41, It Is Threefold.

First, the court held "the other three motions" * * * "sought same relief on the same grounds * * * and" * * * were all dealt with in the opinion styled Richardson v. Brunner, 327 S. W. 2d 572, Appendix hereto 1, *infra*, pp. 35-39. This was error, see p. 26 above; second, in holding that the motion of March 24 1959 (after the opinion of March 6, 1959, had been rendered) under CR 60.02(4) "the judgment is void" was an attempt to relitigate the questions on the first appeal, under CR 60.02(1) * * * "excusable neglect"; (3) * * * "other misconduct of an adverse party"; (6) "any other reason of an extraordinary nature justifying relief from the operation of the judgment" and in holding that the validity ("the judgment is void") of said default judgment was decided on those appeals and hence the opinion on the first of these appeals was *res judicata*. THE THIRD PHASE OF THIS THIRD ERROR (WHICH MOST CERTAINLY WAS NOT LITIGATED IN

THE FIRST OPINION) CONSISTED IN THE COURT'S ERROR IN FAILING TO PASS ON THE CONSTITUTIONAL QUESTIONS RAISED OR TO MAKE ANY EXPLANATION OR GIVE ANY REASON FOR NOT PASSING UPON THEM.

CONCLUSION.

For the foregoing reasons: namely, (1) that the default judgment is void; (2) that the taking of your petitioner's property under void judgment is taking it without due process of law; (3) that KRS 91.540 is unconstitutional; it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

FRANK E. HADDAD,
929 Kentucky Home Life Building,
Louisville, Kentucky,
Attorney for Petitioner.

HECTOR E. ROSE,
ROBERT HUBBARD,
Of Counsel.

APPENDIX

APPENDIX I.

COURT OF APPEALS OF KENTUCKY

RENDERED MARCH 6, 1959

RALPH RICHARDSON, - - - - - - *Appellant,*

v.

C. C. BRUNNER, - - - - - - - - *Appellee.*

Appeal from the Jefferson Circuit Court,
Chancery Branch—First Division,
Honorable Macauley L. Smith, Judge.

OPINION OF THE COURT BY JUDGE BIRD—AFFIRMING; REHEARING DENIED OCTOBER 16, 1959).

This action involves the title to real property.

On October 22, 1956, a default judgment was entered against Ralph Richardson in favor of C. C. Brunner.

On November 23, 1956, Richardson filed a motion to vacate the default judgment under CR 55.02 and 60.02(1-3-6). Various affidavits were filed in support of the motion and against it. The motion was heard and overruled by order on December 3, 1956. On December 28, 1956, Richardson filed a notice of appeal by which he appealed from the order of December 3, 1956, refusing to vacate the default judgment.

On March 11, 1957, Richardson filed another motion under CR 55.02 and 60.02(1-3-6) to vacate the default judgment of October 22, 1956, and the order of December 3, 1956,

overruling his first motion to vacate under CR 55.02 and 60.02(1-3-6). This second motion of March 11, 1957, to vacate was overruled on March 15, 1957, and on the same day he filed his notice of appeal from the ruling on the second order denying relief under CR 55.02 and 60.02(1-3-6).

On March 22, 1957, Richardson filed a third motion to vacate under CR 55.02 and 60.02(6) which sought to vacate all previous judgments and orders refusing relief under CR 55.02 and 60.02. This order was overruled on March 22, 1957, the day it was filed. Notice of appeal from that order was filed on the same day.

Richardson has appealed from each of the three orders denying him relief under CR 55.02 and 60.02(1-3-6).

We shall discuss the appeals in the same order in which they were taken. The rules relied upon read as follows:

55.02

"For good cause shown the court may set aside a judgment by default in accordance with Rule 60.02."

60.02

"On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02; (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason of an extraordinary nature justifying relief from the operation of the judgment. * * *"

Let us consider the first motion to vacate under CR 60.02. For the purpose of this discussion we shall assume that the defendant, Richardson, had a valid defense. While highly questionable we shall likewise assume that he properly defined that defense in his motion. This does not of itself entitle the defendant to the relief sought. He must explain why he did not present that defense upon the trial and thus excuse his default. Paul C. Dant v. Progress Paint Mfg. Co., Ky., 309 S. W. 2d 187.

Let us consider his reasons for not defending:

(1) He says that Brunner's counsel so misrepresented certain facts to him that "he had given up all hope of saving his property" to which Brunner held a tax deed. There were some negotiations between Richardson and Brunner's counsel but the record shows that these negotiations occurred almost a year before the suit was filed. The record also discloses an affidavit by Brunner's counsel in which it is specifically sworn as follows: "There were no misrepresentations made to the said Ralph Richardson, he was merely told what Mr. Brunner would take to reconvey the property to said Richardson." If representations made long before the filing of the action may be considered within the purview of CR 60.02, the court nevertheless had sufficient evidence upon which to determine the issue against Richardson and find that there was no misrepresentation or misconduct on the part of Brunner or his counsel. We would therefore not disturb the determination of the trial court.

(2) He says that he couldn't defend the action because of his inability to pay an attorney to represent him. However, the record shows that he did procure an attorney shortly after the default judgment was taken. He does not undertake to say that he did not have the same resources before the default judgment as after. In fact, the record discloses that he owned property other than that involved

in this action. The record also shows that, during the year in which this action was originally filed, he was collecting rent. The record shows that he had from May until late October to make arrangements for counsel. There is sufficient evidence in the record upon which the court might determine that Richardson was able to employ counsel, and there is nothing in this motion to show that he tried to employ counsel.

(3) Finally he gives his ignorance and illiteracy as an excuse for not defending the action. He may be uneducated but the record, words to the countrary notwithstanding, shows Richardson to be a rather intelligent person. The record discloses that he knew enough to seek advice of counsel on matters about which he was uninformed. He did that before the action but there is nothing in his motion or affidavit to show that he sought advice after the action was filed.

Any action under CR 60.02 addresses itself to the sound discretion of the court and the exercise of that discretion will not be disturbed on appeal except for abuse. Fortney v. Mahan, Ky., 302 S. W. 2d 842. The record fully authorizes the trial court's finding and conclusion. It is therefore the opinion of this Court that there has been no abuse of discretion and that the judgment of the trial court on the first motion should be affirmed.

In the second and third motions Richardson makes the bare assertion that he is moving under CR 60.02 and states not a single fact upon which he may base his right to use the rule for relief. Facts are stated which may have been quite pertinent to a defense of the original action but none are asserted either in the motion or by supporting affidavit to show why he was prevented from asserting those facts in the original action. In other words there is nothing in either of the motions which tends to explain the default. In Dant v. Progress Paint Mfg. Co., Ky., 309 S. W. 2d 1

we explicitly held that, under those conditions, the moving party is presumed to have no explanation. The showings made in the second and third motions are wholly insufficient and the trial court was correct in denying the relief sought.

For the reasons stated each of the three orders of the trial court are affirmed.

Attorneys for Appellant:

ROBERT HUBBARD,
501 Ky. Home Life Building,
Louisville, Kentucky,

H. E. ROSE,
528 Ky. Home Life Building,
Louisville, Kentucky.

Attorneys for Appellee:

JOSIAH B. GATHRIGHT,
Kentucky Home Life Building,
Louisville, Kentucky,

C. L. BELL,
Center Building,
Louisville, Kentucky.

APPENDIX II.

COURT OF APPEALS OF KENTUCKY

OCTOBER 23, 1959

RALPH RICHARDSON, - - - - - - *Appellant.*

v.

C. C. BRUNNER, - - - - - - - *Appellee.*

Appeal from Jefferson Circuit Court,
Honorable Macauley L. Smith, Judge.

OPINION OF THE COURT BY JUDGE STEWART—AFFIRMING.

The appeal now before us grows out of a fourth attempt by motion to vacate a default judgment, pursuant to CR 55.02 and CR 60.02(4), on the ground that it was void ab initio. This appeal was taken from the order overruling the motion. The judgment was rendered on October 22, 1956, against appellant, Ralph Richardson, in favor of appellee, C. C. Brunner, in the Jefferson Circuit Court. It vested Brunner with fee simple title to certain real estate in Louisville which Richardson claimed he owned.

The other three motions which sought the same relief on the same ground were overruled and, on an appeal to this Court from the order entered, were all dealt with in an opinion styled Richardson v. Brunner, Ky., 327 S. W. 2d 572. The facts are fully set forth in the opinion and

we shall not repeat them. We there held that the three motions were properly overruled.

Although the above opinion does not specifically state that the judgment rendered in the original action was a valid one, such a determination in this respect may be plainly inferred from the refusal of this Court to uphold any of appellant's contentions on the former appeal, with the result that the judgment was left undisturbed. However, in order to dispel any doubt that may now exist on this point, we unequivocally hold the judgment must stand as entered in the lower court.

The instant motion undertakes to relitigate, as did the other three motions, the same issue between the same parties as regards the same subject matter, namely, that the judgment is a nullity so that Richardson still owns the property, but it is our view this issue has been finally and conclusively adjudicated. In other words, the doctrine of res judicata applies and bars any further litigation of this issue.

Wherefore, the judgment is affirmed.

Attornys for Appellant:

FRANK E. HADDAD, JR.,
529 Ky. Home Life Building,
Louisville, Kentucky,

H. E. ROSE,
529 Ky. Home Life Building,
Louisville 2, Kentucky,

ROBERT HUBBARD,
501 Ky. Home Life Building,
Louisville 2, Kentucky.

Attorneys for Appellee:

C. L. BELL,
Center Building,
Louisville 2, Kentucky,

JOSIAH B. GATHRIGHT,
Ky. Home Life Building,
Louisville, Kentucky.

APPENDIX III.

CONSTITUTIONS—STATUTES—RULES OF CIVIL PROCEDURES INVOLVED.

Paragraph 1 of Article 14 (Fourteenth Amendment of the Constitution of the United States) reads in part as follows:

> "• • • Nor shall any state deprive any person • • • of property without due process of law."

Sub. (1) and Sub. (6) of paragraph (b) of Rule 12 of the Federal Rules of Civil Procedure, 28 U. S. C. A. p. 335, 1950 Edition, reads as follows:

> "(1) Lack of jurisdiction over the subject matter • • •.
>
> "(6) Failure to state a claim upon which relief can be granted • • •."

and paragraph (h) of Rule 12 of the Federal Rules of Civil Procedure U. S. C. A., p. 336, 1950 edition, reads in part as follows:

> "(h) Waiver of Defenses. A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, • • •."

28 U. S. C. A. Federal Rules of Civil Procedure, subparagraph (c) of paragraph 2 of Rule 55, page 147, 1950 edition, reads as follows:

> "(c) Setting aside default. For good cause shown the Court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b)."

And Sub. (1), Sub. (3), Sub. (4), and Sub. (6) of Subparagraph (b) of Rule 60 of the Federal Rules of Civil Procedure, U. S. C. A. page 310, 1950 edition, reads in part, as follows:

> "• • • (1) • • • or excusable neglect; • • • (3) • • • or other misconduct of an adverse party; (4) the judgment is void; • • • (6) any other reason justifying relief from the operation of the judgment. • • •"

Paragraph (3) of Section 1257 of the U. S. C. A. Judiciary and Judicial Procedure, page 88, 1949 edition, reads as follows:

> "(3) By writ of certiorari, • • • the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, • • • the United States, or where any title, right, • • • is specially set up or claimed under the Constitution • • •"

Section two of the Constitution of the State of Kentucky, is, in part:

> "Absolute and arbitrary power over • • • property of Freeman exists nowhere in a Republic, not even in the largest majority."

Section One Hundred and Nine of Kentucky's Constitution is, in part:

> "The judicial power of the Commonwealth both as to matters of law and equity, shall be vested in • • • one Supreme Court (to be styled The Court of Appeals.)and the courts established by the Constitution." Kentucky Revised Statutes, 1953 Edition, pages 38, 54.

Section 91.470 of the Kentucky Revised Statutes 1953 edition, page 691, published by the Kentucky Statute Revision Commission reads as follows:

"91.470 (3001) Sale of Personal Property for City Taxes.

"(1) Except as provided in KRS 91.550, the Tax Receiver shall, immediately upon the filing of the lists of unpaid tax bills, distrain the personal property owned or in the rightful possession of the taxpayer, notwithstanding the existence of any lien, except the lien for State taxes, upon the property, and may proceed to sell the title of the taxpayer in a sufficient amount of the property to pay the tax, penalties, interest and costs."

Section 91.480 of the Kentucky Revised Statutes, 1953 edition, page 692, published by the Kentucky Statute Revision Commission, reads as follows:

"(91.480 (3001; 3003)) Sale of Real property for City Taxes.

"(1) If no personal property is reasonably available out of which the tax bill can be collected by distraint, the Tax Receiver shall sell, for cash, a sufficient amount of the real property belonging to the taxpayer to pay the tax, penalties, interest and costs, subject to the provisions of KRS 91.550. The sale shall be at public auction, in the same manner that property is sold under Execution, except that the sale shall be had at the door of the City Hall of the city in which the land lies, and the land need not be appraised or levied on. The sale shall be advertised by posting for fifteen days before the sale a written or printed notice at the City Hall door, and by publication at least four weeks prior to the day of sale by one insertion in a newspaper published in the English language in the city.

"(2) The tax receiver shall, not less than fifteen days before the sale, mail to the taxpayer a postal card addressed to his residence or place of business, if it can be ascertained, notifying him of the time and place of the sale. In order to cover the cost of the advertisement and notification, the tax receiver shall collect a fee of two dollars from each person whose property is

advertised, and shall pay the fee into the City Treasury. In no event shall the City pay the fee.

"(3) The failure of the Tax Receiver to send or of the taxpayer to receive the notice of sale required by sub-section (2) of this section shall not invalidate the sale or any subsequent proceedings thereunder, and no levy or attempted levy upon personal property shall be necessary to validate any sale of real property, whether for taxes on real property, personal property or both."

Section 91.540 of the Kentucky Revised Statutes, 1953 edition, page 693, by the Kentucky Statute Revision Commission reads as follows:

"91.540 (3004) Deed to purchaser at tax sale; effect as evidence.

"If real property is not redeemed within the time allowed for redemption, a fee simple title shall vest absolutely in the purchaser, subject only to state taxes, and the Tax Receiver shall thereupon convey the property by deed to the purchaser. The purchaser shall then be entitled to possession of the property, and may recover it by action or motion. * * * The deed shall be prima facie evidence of the regularity of the sale, of all prior proceedings, and of title in the purchaser to whom the deed is executed."

Section 411.120 of the Kentucky Revised Statutes, 1953 edition, page 2939, published by the Kentucky Statute Revision Commission, reads in part as follows:

"411.120 (11) Action to quiet title; court order of title proved.

"Any person having both the legal title and *possession of land may* prosecute suit, by petition in equity, in the circuit court of the county where the land or some part of it lies, against any other person setting up a claim to it. * * *."

CR 1 of the Kentucky Rules of Civil Procedure, page 1, 1st official edition, July 1953, reads in part as follows:

> "CR 1. SCOPE OF RULES. These rules govern the procedure and practice in all courts of this State, * * * with the exception that they do not govern procedure and practice in any special statutory proceeding * * *."

Rule 12.02 pages 19-20 First Official Edition, July 1953, of the Kentucky Rules of Civil Procedure reads in part as follows:

> "CR 12.02. HOW PRESENTED. Every defense, in law or fact, to a claim for relief in any pleading, * * * shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, * * * (6) failure to state a claim upon which relief can be granted, * * *."

CR 55.02 of the Kentucky Rules of Civil Procedure reads, page 83, 1st official edition, July 1953, in part as follows:

> "CR 55.02. SETTING ASIDE DEFAULT. For good cause shown the court may set aside a judgment by default in accordance with Rule 60.02."

Rule 60.02 of the Kentucky Rules of Civil Procedure reads, page 89, 1st official edition, July 1953, in part as follows:

> "CR 60.02. MISTAKE; INADVERTENCE; EXCUSABLE NEGLECT; NEWLY DISCOVERED EVIDENCE; FRAUD, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) * * * or excusable neglect; (3) * * * misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; * * * (6) any other reason of an extraordinary nature justifying relief from the operation of the judgment * * *."

APPENDIX IV.

JEFFERSON CIRCUIT COURT

CHANCERY BRANCH, DIVISION

C. C. BRUNNER, - - - - - - - - *Plaintiff,*

v.

RALPH RICHARDSON,
621 S. 13th Street,
M. KAUFMAN, (W.O.)
212 Main Street,
Little Rock, Arkansas,
and
FANNIE KAUFMAN, (W.O.)
212 Main Street,
Little Rock, Arkansas, - - - - *Defendants.*

COMPLAINT.

Comes the plaintiff, C. C. Brunner, and states that he is the record title owner of the hereinafter described property in Louisville, Kentucky:

Beginning at the North West corner of 7th and Cedar Streets; thence North with the West line of 7th street 70 feet; thence West and parallel with Cedar Street 55 feet 8 inches; thence South and parallel with 7th street 2 feet; thence West and parallel with Cedar street 56 feet 10 inches, more or less, to the East line of the lot conveyed to James Lewers and wife by deed dated April 15, 1847 and recorded in Deed Book 68, Page 70, in the office of the clerk of the Jefferson County Court, Jefferson County, Kentucky; thence South with said line 68 feet to the North line of Cedar

Street; thence East with the North line of Cedar street 112 feet 6 inches, more or less, to the point of beginning.

Being the same property conveyed to C. C. Brunner by deeds dated December 8th 1952 by Vernon H. Wetherby, Tax Receiver of the City of Louisville, and recorded in Deed Book 2968, Page 93, Deed Book 2968, Page 112, and Deed Book 2968, Page 117.

Plaintiff states that Ralph Richardson is made a party hereto to assert any claim or interest in the above described property that he may have by reason of a deed to him dated August 12, 1946 and recorded in Deed Book 2154 Page 570 in the office of the clerk of the Jefferson County Court, Jefferson County, Kentucky.

Plaintiff says that his rights are affected, and that an actual controversy exists with respect to his rights, under KRS 91.540; that the plaintiff contends that he is the fee-simple owner of the heretobefore deseribed property and that he is entitled to the immediate possession of the said property, and that he is entitled to a declaration of his rights by this Court.

Plaintiff states that there is a mortgage against the said property payable to M. and Fannie Kaufman recorded in Deed Book 2454 page 570 in the office of the Clerk of the Jefferson County Court, Jefferson County Kentucky; that they are made parties to this action to assert any claim that they may have against the said property.

Plaintiff says that the defendants M. Kaufman and Fannie Kaufman are non-residents of this state and that they are absent therefrom; that they are now residents at 212 Main Street, Little Rock, Arkansas, which is the place wherein a post office is maintained nearest to the residence of these defendants.

Wherefore, plaintiff, C. C. Brunner, prays this Court for a declaratory judgment directing the defendant, Ralph Richardson, to release any and all rights or claim that he makes against the property herein; that this plaintiff be declared to be the owner of the fee-simple title thereto; and for warning order attorney be appointed for the defendants Fannie Kaufman and M. Kaufman to notify them of the pendency of this action; and for all other relief to which he may appear entitled.

(s) Josiah B. Gathright,
for
Bell & Gathright,
Counsel for Plaintiff,
608-9 Realty Bldg.,
Clay 4894.

Plaintiff, C. C. Brunner, says that the statements contained in the above complaint are true as he verily believes.

(s) C. C. Brunner
C. C. Brunner.

Subscribed and sworn to before me by C. C. Brunner, this the 20th day of April, 1956. My commission expires 6-7-57.

(s) C. L. Bell,
Notary Public, Jefferson Co., Ky.

APPENDIX V.

JEFFERSON CIRCUIT COURT

CHANCERY BRANCH, FIRST DIVISION

C. C. BRUNNER, - - - - - - - *Plaintiff.*

v.

RALPH RICHARDSON, ET AL., - - - *Defendants.*

JUDGMENT.

The defendant, Ralph Richardson, having been duly summoned and having failed to appear or to make a defense, it is ordered that judgment be entered for the plaintiff, C. C. Brunner, against the defendant, Ralph Richardson, for the title to the following described property which was demanded in the complaint of the plaintiff:

> Beginning at the North West corner of 7th and Cedar Streets; thence North with the West line of 7th street 70 feet; thence West and parallel with Cedar Street 55 feet 8 inches; thence South and parallel with 7th Street 2 feet; thence West and parallel with Cedar Street 56 feet 10 inches, more or less, to the East line of the lot conveyed to James Lawers and wife by deed dated April 15, 1947 and recorded in Deed Book 68 Page 70, in the office of Clerk of the Jefferson County Court, Jefferson County, Kentucky; thence South with said line 68 feet to the North line of Cedar Street; thence East with the North line of Cedar Street 112 feet 6 inches, more or less, to the point of beginning.
>
> Being the same property conveyed to C. C. Brunner by deeds dated December 8th, 1952, by Vernon B. Wetherby, Tax Receiver of the City of Louisville, and

recorded in Deed Book 2968 Page 93, Deed Book 2968 Page 112 and Deed Book 2968 Page 117.

and the absolute fee-simple title to the said property as to the said defendant above named is in the plaintiff, C. C. Brunner, and adjudged free of any claim of said defendant. Plaintiff to pay costs including $6.00 Commissioner's Fee.

(s) Macauley L. Smith,
Judge.

Entered Oct. 22, 1956.

APPENDIX VI(a).

JEFFERSON CIRCUIT COURT

CHANCERY BRANCH, FIRST DIVISION

C. C. BRUNNER, - - - - - - - - *Plaintiff.*

v.

RALPH RICHARDSON, - - - - - - - - *Defendant.*

MOTION.

Comes defendant, Ralph Richardson, and moves the Court, under CR 55.02 and 60.02(4), to set aside and hold for naught the default judgment entered herein on October 22, 1956, on the ground that said judgment is void. Although the Court had jurisdiction (1) of the person of the defendant, and (2) of the subject matter; (3) there was and is a "want of power" in the Court "to grant the relief attempted to be granted" in this judgment. Lortan, et al. v. Ashbrook, et al., 220 Ky. 830, 295 S. W. 1027. In other words, the default judgment is void because the Court lacked—did not have jurisdiction—the power to decree a deed valid which is and was void ab initio.

The complaint is insufficient to sustain a default judgment decreeing title in the plaintiff, because (1) it fails to state that tax receiver distrained and sold, or attempted to distrain or sell, in compliance with the mandatory provisions of KRS 91.470, any personal property, (2) it fails to allege that the tax receiver, in compliance with the plain provisions of KRS 91.480 sold only a sufficient amount of real estate "belonging to the taxpayer to pa the tax, penalties, interest and costs"; (3) it fails to alle e that the

tax receiver advertised the sale by written or printed notice by posting same for 15 days before the sale at the City Hall door; (4) it fails to allege that said tax receiver advertised said sale by publication at least four weeks prior to the day of the sale by one insertion in a newspaper published in the English language in the city; (5) it fails to allege that the sale was at public auction; (6) and it fails to allege that the tax receiver mailed a notice of the sale to the taxpayer, the defendant. In order for the Court to render a valid judgment in this character of case, not only must the plaintiff allege all the facts above set out, but he must prove them. Lowther v. Moss, 239 Ky. 290, 39 S. W. 2d 501; Soper, et al. v. Foster, et al., 244 Ky. 658, 51 S. W. 2d 927; Wagner v. Peoples Bldg. and Loan Assn., 292 Ky. 671, 167 S. W. 2d 825.

"A judgment is void when the Court proceeds without authority and in a manner forbidden by law with respect to the matter being adjudicated, although it may have jurisdiction of the parties and of the subject matter". Wagner v. Peoples Building & Loan Assn., supra. The Court here in the case at bar proceeded without authority to declare valid, deeds void ab initio.

KRS 91.540 is a drastic statute. It is, in reality, in its very essence and nature confiscatory and to avoid the contravention of the fifth and fourteenth amendments of the Constitution of the United States forbidding the taking of one's property without due process of law, both the pleadings and evidence in such a case must clearly and definitely establish that all the mandatory statutory provisions in respect to the tax sale have been complied with. Chaney, et al. v. Commonwealth, 314 Ky. 279, 234 S. W. 2d 960. Hence, since all the mandatory provisions of KRS 91.470 and KRS 91.480, hereinabove set forth, were neither pled nor proven, the default judgment herein is void, because it takes defendant's property without due process of law.

Defendant files herewith in support of said motion his affidavit.

(s) Frank E. Haddad, Jr.,
Frank E. Haddad, Jr.,

(s) H. E. Rose,
H. E. Rose,

(s) Robert Hubbard,
Robert Hubbard,
Attorneys for Defendant,
Kentucky Home Life Building.

APPENDIX VI(b).

JEFFERSON CIRCUIT COURT

CHANCERY BRANCH, FIRST DIVISION

C. C. BRUNNER, - - - - - - - - *Plaintiff.*

v.

RALPH RICHARDSON, ET AL., - - - - *Defendants.*

ORDER.

This cause coming on to be heard on Defendant's motion, supported by his affidavit, under CR 55.02 and CR 60.02(4), and the Court being advised, overruled said motion, to which ruling of the Court the defendant objects on the ground that plaintiff's complaint is fatally defective in that it fails to allege that the city tax receiver complied in the sale of the tax bills with each and every mandatory provision of Sections KRS 91.470 and KRS 91.480, namely; (1) that said tax receiver distrained or attempted to distrain available personal property of the defendant; (2) that he did not sell any more real estate than necessary to pay said tax bills; (3) that he held an auction; (4) that he advertised the sale by written or printed notice, posting same for 15 days before the sale at the City Hall door; (5) that said tax receiver advertised said sale by publication at least 4 weeks prior to the day of the sale by one insertion in a newspaper published in the English language in the city; (6) that the tax receiver mailed a notice of the sale to the tax payer, the defendant; and further objects on the ground that without such allega-

tions in the complaint, it does not give the Court jurisdiction of the subject matter to render the default judgment rendered, and that said default judgment is void, and on the further ground that without said allegations and proof thereof said default judgment is the taking of defendant's property without due process of law in contravention of the Fifth and Fourteenth Amendments of the Constitution of the United States.

(s) Smith,
Judge.

(s) Entered April 14, 1959.

April 14, 1959.

Copy Received.

(s) Josiah B. Gathright.

(s) Frank E. Haddad, Jr.,
(s) H. E. Rose,
(s) Robert Hubbard,
Attorneys for Defendant.